(5)

No. 01-1080

Supreme Court, U.S.
FILED
FEB 23 2002
CLERK

IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* OF THE INFORMATION SERVICES EXECUTIVE COUNCIL OF THE DIRECT MARKETING ASSOCIATION

AMY J. OH, ESQ.
MICHAEL A. TURNER, PH.D.
PETER A. JOHNSON, PH.D.

INFORMATION SERVICES EXECUTIVE COUNCIL OF
THE DIRECT MARKETING ASSOCIATION
1120 Avenue of the Americas
New York, NY 10036
(212) 768-7277

Date: February 23, 2002

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

2788

QUESTIONS PRESENTED

I. Whether Trans Union's speech (truthful lists of selected names, addresses, and other information regarding consumers also known as target marketing lists) relates to matters of only private concern such that the speech at issue is subject to reduced First Amendment protection under *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)?

II. Whether an administrative ban on speech (opt-in requirement for dissemination of consumers' names and addresses on Trans Union's target marketing lists pursuant to the Federal Trade Commission's decision that they were "consumer reports" pursuant to the Fair Credit Reporting Act) satisfies intermediate scrutiny in the absence of any evidence that it is narrowly tailored to an important governmental interest?

The parties' written consent to the filing of this brief has been filed with the Clerk of Court. No counsel for a party authored this brief in whole or part nor did any party make a financial contribution in preparation or execution of this brief of *amicus curiae.*

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT ... 3

ARGUMENT 6

I. THE CIRCUIT COURT ERRED BY EXPANDING *DUN & BRADSTREET* TO CREATE A "NO MATTER OF PUBLIC CONCERN" STANDARD TO TRUTHFUL, LAWFULLY OBTAINED SPEECH SUBJECT TO DIMINISHED FIRST AMENDMENT PROTECTION. 6

A. The D.C. Circuit Court Erred In Its Factual Assumption That Information Communicated In Trans Union's Target Marketing Lists Were Only of Private Concern. 6

B. The Appellate Court Misapplied *Dun & Bradstreet* To This Case, Because the Facts and Circumstances in the Two Cases are Substantively Different – The Former Involved Harmful, Defamatory Speech Containing Sensitive Financial Information while the Latter Involved Truthful Beneficial Speech Containing Non-Sensitive Information. 11

II. THE CIRCUIT COURT ERRED IN ITS APPLICATION OF INTERMEDIATE SCRUTINY. 13

A. The Circuit Court Erred When it Concluded that the Fair Credit Reporting Act Was Narrowly Tailored To a Substantial Governmental Interest. 13

B. The Circuit Court Erred by Rejecting Trans Union's Argument that the "Opt-out" Requirement is a Substantially Less Restrictive Means of Limiting Trans Union's Speech than an Opt-in Requirement. 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES:

Action For Children's Television v. F.C.C., 58 F.3d 654 (D.C. Cir. 1995) 13

Arkansas Writer' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 14

Bartnicki v. Vopper, 532 U.S. 514 (2001) 10

Bolgers v. Youngs Drugs Prods. Corp., 463 U.S. 60 (1983) 10, 11

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 13

Connick v. Myers, 461 U.S. 138 (1983) 7

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) ..... *passim*

FCC v. League of Women Voters, 468 U.S. 346 (1984) 14

Florida Star v. B.J.F., 491 U.S. 524 (1989) 10

In re Trans Union Corp., Opinion of the Commission, No. 9255 (Feb. 10, 2000) 14

Martin v. Struthers, 319 U.S. 141 (1943) 10

Shapero v. Kentucky, 486 U.S. 466 (1988) 10

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 10

Trans Union II, 245 F.3d 808 (quoting *Dun & Bradstreet*, 472 U.S. 749 (1985) 4, 12

Trans Union III, 267 F.3d 809 (2001) 7, 10, 11, 13, 15

U.S. West, Inc. v. Federal Communications Commission, 182 F.3d 1224 (10th Cir. 1999), *cert. denied* 528 U.S. 1188 (2000) 17

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 16

CONSTITUTIONAL PROVISIONS AND STATUTES:

United States Constitution

First Amendment ..... i, 6, 16

United States Code

15 U.S.C. § 1681(c)(1)(B)(i) 5, 14

Federal Regulations

55 Fed. Reg. 18804 5
55 Fed. Reg. 18807 ..... 5, 14, 15

MISCELLANEOUS:

The Boston Consulting Group in partnership with The Initiative for a Competitive Enterprise, THE BUSINESS CASE FOR PURSUING RETAIL OPPORTUNITIES IN THE INNER CITY (1998) 19n

Elrick & Lavidge Marketing, RESEARCH DIRECT INTERACTIVE BUYING PRACTICES STUDY (1999) 19n

Gramm-Leach-Bliley Financial Services Modernization Act (GLBA), 106 Pub. L. No. 102, Stat. 1338, tit. V (1999) (codified at various sections of 15 U.S.C.) 3

The Direct Marketing Association, STATISTICAL FACT BOOK, (24th ed., 2001) 8n, 9n

Michael A. Turner, Ph.D., THE IMPACT OF DATA RESTRICTIONS ON CONSUMER DISTANCE SHOPPING (March 2001) 8n, 18n

Michael A. Turner, Ph.D., LIKELY IMPACT OF USPS ON RESTRICTIONS ON FREE FLOW OF INFORMATION (July 2001) 18n

The Direct Marketing Association, ECONOMIC IMPACT: U.S. DIRECT MARKETING TODAY, 7th ed. (forthcoming April 2002) 9n

Michael A. Turner, Ph.D., THE IMPACT OF DATA RESTRICTIONS ON FUNDRAISING FOR CHARITABLE & NONPROFIT INSTITUTIONS (forthcoming 2002) 17n

INTEREST OF *AMICUS CURIAE*

The Information Services Executive Council (ISEC) is an industry segment group of The Direct Marketing Association (The DMA), which is the largest trade association for businesses interested in interactive and database marketing, with over 5,000 corporate, nonprofit, and individual members, including Trans Union LLC (TU). Among the service industries within the direct marketing industry are the Information Service Providers (also information aggregators), of which Trans Union is one. Information Service Providers are represented within The DMA through ISEC. Since its inception, ISEC's primary mission has been to promote and advance the responsible use of information, balancing the legitimate concerns for individual privacy with the practical necessity of access to information in the New Economy.

The case of *Trans Union LLC v. Federal Trade Commission* is of particular interest to amicus curiae, because the Federal Trade Commission's ban on Trans Union's speech restricts the use of non-sensitive commercial information for marketing purposes and therefore restricts the direct marketing industry as a whole, as well as the business model of ISEC members in particular. As will be explained more fully below, the 5,000 plus members of The DMA are extraordinarily dependent on the free flow of information organized through information aggregators for providing solicitations, raising donations, and providing customer service to millions of Americans. Impediments to the free flow of non-sensitive core marketing data -- such as those placed upon Trans Union in this case, and other information aggregators by extension -- impose undue additional marketing and administrative costs upon the entire direct marketing industry, resulting in higher prices for consumers, lower quality of customer service, diminished social services from charities, and fewer jobs. ISEC and The DMA have a harmony of interests with the general public in promoting the re-

sponsible use of non-sensitive marketing data to the benefit of the economy and the consumer alike.

Information aggregators such as Trans Union LLC play a key role in the direct marketing industry because they collect, improve, and repackage the vast amounts of information upon which the direct marketing industry relies. Indeed, the marketing of goods and services through targeted, information-based solicitation is the feature which most clearly distinguishes the direct marketing industry from the general (non-targeted) marketing or advertising industry.

The information used by TU, and thus the direct marketing industry, originates from a wide range of sources, and much of it is already in the public domain. TU, like other information aggregators, uses this information to construct lists of consumers possessing certain attributes which a client party believes desirable to target for a particular solicitation. For example, such a list might contain individuals whose age characteristics indicate a likelihood to purchase a particular product or service relevant to that characteristic (such as early-retirement financial services). These lists are purchased directly by organizations that engage in direct marketing (including non-profits or political parties) or purchased indirectly through list brokers who act as middlemen. The nature and purpose of each communication (each list) vary widely, depending on the needs of Trans Union's clients. These purposes include, but are not limited to, commercial activities, charitable fund-raising, and political solicitation and communication. In sum, information aggregators like TU are the indispensable hub within the direct marketing industry for the dissemination and communication of the information essential to the distinctive direct marketing industry.

INTRODUCTION & SUMMARY OF ARGUMENTS

The particular speech at issue in this case takes the form of lists of selected names and addresses of individuals originating in part from what Amicus Curiae regards as non-sensitive information contained in so-called "credit headers" (so called because this information is placed at the top of a credit report, though it contains no sensitive financial information).

In applying the Fair Credit Reporting Act (FCRA or Act), the Federal Trade Commission's (FTC) regulation determined that Trans Union's target marketing lists containing names and addresses of individuals gathered from credit headers nevertheless constituted "consumer reports" under the Act, not withstanding the record, and thus found communication of it impermissible. The FTC therefore prohibited Trans Union from selling the lists without the expressed permission of each individual on that list. This imposed an "opt-in" (i.e., highly restrictive affirmative consent) requirement on this information, despite the evident intent of Congress to impose a less restrictive "opt-out" requirement as reflected in another federal statute that similarly aims to promote the governmental interest in protecting people's financial information, the Gramm-Leach-Bliley Financial Services Modernization Act (GLBA), 106 Pub. L. No. 102, Stat. 1338, tit. V (1999) (codified at various sections of 15 U.S.C.).

The impact upon Trans Union from this administrative ban is that it severely restricts TU's ability to communicate information in its target marketing lists unless it obtains permission from the millions of individuals whose names are currently stored in its database.

As will be shown more fully below, the extreme cost and impracticality of the opt-in requirement amounts to a blanket prohibition on Trans Union's communication of this information. Within the universe of information, credit-header data is particularly

crucial to direct marketing. Because individuals have a greater incentive to update their non-sensitive data (particularly their address or contact information) with their financial service providers than they do with almost any other agency, credit header information is regarded by direct marketers as probably the most accurate source of the name and address data necessary to accurately market their goods and services. In practice, the FTC's ban could potentially prohibit the dissemination of almost every name and address of individuals in Trans Union's database, with corresponding denial of these lists to direct marketers.

For the reasons stated below, we ask the Supreme Court to hear Trans Union's Petition for Writ of Certiorari:

1. The D.C. Circuit Court erred in its factual assumption that Trans Union's lists of selected names and addresses of individuals (also known as target marketing lists) were "solely in the individual interest of the speaker and its specific business audience" thus deserving reduced Constitutional protection. *Trans Union II*, 245 F.3d 809, 818 (quoting *Dun & Bradstreet*, 472 U.S. 749, 762 (1985)). Unlike the speech at issue in *Dun & Bradstreet, Inc. v. Greenmoss Builder, Inc*, which involved a matter of only private concern, *amicus curiae* asks the Court to recognize the speech at issue in this case, Trans Union's target marketing lists, involves a matter of important public concern.

Contrary to the Circuit Court's decision, TU's communication of information contained in its target marketing lists concern a matter of immense public importance. The threatened negative economic impact from restricting the use and communication of information via the FTC's opt-in regime is both broad and substantial. Not only does this ban threaten direct marketing's important role in the national economy, it threatens to remove substantial economic efficiencies and ease of service enjoyed by consumers. It also

threatens the economic viability of non-profit organizations (including charities and political entities) and the United States Postal Service (USPS).

2. Moreover, the D.C. Circuit Court misapplied *Dun and Bradstreet* in this case, because the facts presented in *Dun and Bradstreet* are distinguishable. Whereas *Dun and Bradstreet* is a defamation case, involving the dissemination of false and harmful information about one company to only five people, the speech at issue in this case involves accurate, lawfully obtained information that poses no harm. Also, the former involves sensitive financial information whereas the latter involves non-sensitive information.

3. The Circuit Court erred in its application of intermediate scrutiny, because the Fair Credit Reporting Act is not narrowly tailored to the substantial governmental interest in protecting personal financial data. Trans Union's "underinclusiveness" challenge merits special attention, because the FCRA permits target marketing for offers of credit and insurance, subject to choice by consumers to opt-out, whereas target marketing for other purposes are subject to an opt-in requirement. *See* 15 U.S.C. § 1681(c)(1)(B)(i). Evidence establishes that information that is communicated by TU for ultimate use in target marketing for prescreening offers for credit and insurance ("prescreening") is more invasive of an individual's privacy than information that is communicated for use in target marketing for other purposes, such as for goods and services. *See* 55 Fed. Reg. 18804, 18807 & n. 14 (II 4) (May 4, 1990). Therefore, the threat to privacy from target marketing for other purposes is less significant than for prescreening. Thus, subjecting non-sensitive data to a more stringent set of requirements than already imposed on more sensitive data is a non sequitur.

Further, the FTC's administrative ban fails narrow tailoring requirements, because it subjects target marketing lists for other purposes to opt-in requirements, although the information communicated to

third parties is non-sensitive in comparison to the more sensitive nature of information disclosed to third parties for the purpose of prescreening pre-approved offers for credit and insurance. Contrary to the Circuit Court's opinion, the government can promote its interest (protection of personal financial data) via a less restrictive means by distinguishing what is sensitive financial information from what is non-sensitive information and in balancing consumer's privacy with the benefits of the free flow of information.

4. The D.C. Circuit Court erred in its application of intermediate scrutiny, because it failed to consider the fact that an opt-out requirement is a substantially less restrictive means of limiting Trans Union's speech than the "opt-in" requirement for the disclosure of consumer information in Trans Union's database.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY EXPANDING *DUN & BRADSTREET* TO CREATE A "NO MATTER OF PUBLIC CONCERN" STANDARD TO TRUTHFUL, LAWFULLY OBTAINED SPEECH SUBJECT TO DIMINISHED FIRST AMENDMENT PROTECTION.

A. The D.C. Circuit Court Erred In Its Factual Assumption That Information Communicated In Trans Union's Target Marketing Lists Were Only of Private Concern.

The Appellate Court erroneously presumed that information communicated in Trans Union's target marketing lists was only of a private concern. In fact, the limitation on this form of speech is a matter of immense public importance, considering that fact that the target marketing industry generates enormous benefits to the public and the to U.S. economy. Unlike the speech presented in the case of *Dun & Bradstreet, Inc. v. Greenmoss, Inc.* which was only a matter of pri-

vate concern, TU's communication of information in its target marketing list involves a matter of public concern and importance. *See* 472 U.S. 749 (1985). In *Dun & Bradstreet*, the speech involved took the form of false statements in a credit report that was disseminated by a credit reporting agency to five subscribers indicating that a company had filed for bankruptcy. The credit report was false and grossly misrepresented the company's assets and liabilities. *Id.*

The Court held that a consumer reporting agency's false credit report deserved only qualified constitutional protection, because the report concerned no public issue. *Id.* at 762. The Court based its conclusion, reasoning that the report constituted "speech solely in the individual interest of the speaker and its specific business audience," and that the report reached only "five subscribers, who, under the terms of the subscription agreement, could not distribute it further." *Id.* Accordingly, the D.C. Circuit Court held that Trans Union's speech could be prohibited under intermediate scrutiny because it "relates to no matter of public concern." *Trans Union III*, 267 F.3d 809, 818 (2001).

On the contrary, TU's communication of information in its marketing list does relate to matters of public concern. The Court has held that "[w]hether . . . speech addresses a matter of public concern must be determined by the [expression's] content, form, and context . . . as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-148 (1983).

Trans Union's sale of its target marketing list involves more than merely a commercial transaction. The information in TU's target marketing lists is communicated to and is utilized by varying types of organizations for wide variety of purposes. This information is then used by the third party organization to make further solicitations to contact potential customers, generate public interest or support, recruit or solicit members, or to fulfill other socially beneficial

and productive needs of the entity and of the public. It not only benefits the organization or company using the information to fulfill its purpose and mission, it allows the ultimate recipient of the communication (the consumer, donor, citizen, etc.) to learn more about a product, service, or opportunity. It short, this communication is of benefit to consumers and to the public.

For example, nonprofit and charitable organizations rely heavily on information communicated by information aggregators such as TU in the form of target marketing lists. They use this information to identify the pool of likely donors from within the general population. This allows them to use more cost effective direct mail or telephone solicitation campaigns rather than resorting to inefficient mass mailing or random calling. Similarly, political groups benefit by targeting individuals who are likely to vote for them or would be interested in receiving their solicitations. Additionally, the USPS is a major beneficiary of list-dependent direct mail marketing, which comprises nearly half of its mail volume.[1]

Also, empirical evidence shows that if affirmative consent restrictions were placed on the flow of non-sensitive marketing information, this restriction would likely amount to a de facto hidden tax on the large number of Americans who shop at a distance. For example, a recent study showed that individuals who buy apparel through catalogs would face cost increases ranging from 3.5. to 11 percent if an opt-in privacy requirement were imposed.[2] Findings from this study show that consumers living in economically disadvantaged inner city areas and those living in rural areas will be disproportionately affected by the restriction on the dissemination of non-sensitive marketing information. Such consumers are either underserved by traditional brick-and-mortar companies or live further away from the nearest major retail shopping malls. *See Id.* at 27-37. This argument will be elaborated upon in the last section that touches upon the negative economic impact of the more restrictive opt-in regime.

[1] The Direct Marketing Association, STATISTICAL FACT BOOK, p. 277 (24th ed., 2001).

[2] Michael A. Turner, Ph.D., THE IMPACT OF DATA RESTRICTIONS ON CONSUMER DISTANCE SHOPPING (March 2001). This study was sponsored by the Privacy Leadership Initiative (The PLI) and the Information Services executive Council (ISEC). It is available at www.understandingprivacy.org.

Moreover, direct marketing creates jobs, and equally as important, direct marketing and the databases that power such advertising campaigns level the playing field for companies of all sizes, increasing competition and driving the U.S. economy. For consumers, this brings greater choice, lower prices, and greater opportunity.

In 2001, total gross annual revenue generated by companies engaged in targeted direct marketing exceeded $1.9 trillion. The national sales revenue generated by direct marketing in 2001 to consumers amounted to approximately $1 trillion, representing about 13.5% of total U.S. consumer sales. Additionally, nearly 15.6 million workers were employed in the direct marketing industry in 2001.[3] And, over 79 million consumers made purchasing decisions from direct marketing advertisements, a figure which represents more than 40 percent of U.S. consumers.[4]

Finally, the use of accurate information by the direct marketing industry actually decreases the proportion of undesired direct mail. With the use of correct names and addresses in a target marketing list derived from credit headers, along with other relevant predictive information, companies and organizations can target their communications to individuals who may be more interested in receiving the information.

[3] The Direct Marketing Association, ECONOMIC IMPACT: U.S. DIRECT MARKETING TODAY, 7th ed. (forthcoming April 2002).

[4] The Direct Marketing Association, STATISTICAL FACT BOOK, p. 5 (24th ed., 2001).

Therefore, companies and other organizations can target their audience instead of resorting to mass mailing, which is not only costly but is also inefficient.

It is noteworthy that the Supreme Court has struck down privacy-based restrictions on the publication of truthful information on matters of public concern. E.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that privacy concerns by the disclosure of contents of a private cellular telephone call "give way when balanced against the interest in publishing matters of public importance."); *Florida Star v. B.J.F.*, 491 U.S. 524. 533 (1989) (concluding that the government may not prevent the publication of " 'lawfully obtained information about a matter of public significance' " (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)); *Martin v. Struthers*, 319 U.S. 141, 146-147 (1943) (striking down restrictions preventing door-to-door solicitators from approaching households that do not affirmatively invite them, recognizing that "freedom to distribute information to every citizen . . . is . . . clearly vital to the preservation of a free society.")

In *Trans Union III*, 267 F.3d 1138, 1140-1141, the Appellate Court indicates that petitioner, Trans Union, cited a number of cases in which the Supreme Court "struck down privacy-based restrictions on the publication of truthful information." Pet. at 5-6. The Appellate court erroneously distinguishes these cases cited by petitioner, reasoning that "[u]nlike this case, however, most of the cited cases involve speech on matters of public concern." *Trans Union III*, 267 F.3d 1138, 1141 (2001). On the contrary, information contained in TU's target marketing lists are a matter of public concern and of great public benefit.

Additionally, the Circuit Court erred in disregarding *Shapero v. Kentucky*, 486 U.S. 466 (1988) (striking down privacy based laws that restrict the right of attorneys to send target mail solicitations to potential clients), and *Bolgers v. Youngs Drugs Prods. Corp.*, 463

U.S. 60 (1983) (striking down prohibitions on the mailing of contraceptive advertisements on the basis that they intrude on the recipient's privacy). The Appellate Court concluded that "Trans Union's reliance on these . . . two cases is particularly misplaced, for they stand not for the principle that speech rights 'prevail' over privacy rights 'virtually without exception,' Pet. at 5, but instead for the principle that speech of largely private concern may warrant only qualified protection." *Trans Union III*, 267 F.3d 1338, 1141 (2001). We urge that the Supreme Court revisit theses cases and others without the Circuit Court's erroneous factual assumption that Trans Union's speech concerned only matters of private concern.

B. The Appellate Court Misapplied *Dun & Bradstreet* To This Case, Because the Facts and Circumstances in the Two Cases are Substantively Different – The Former Involved Harmful, Defamatory Speech Containing Sensitive Financial Information while the Latter Involved Truthful Beneficial Speech Containing Non-Sensitive Information.

The facts in *Dun & Bradstreet* are distinguishable from those in the *Trans Union* case. The speech in *Dun & Bradstreet* involved a defamatory credit report that falsely reported the assets and liabilities of a company thereby causing harm to the company. *See* 472 U.S. 749 (1985). On the contrary, the communication in TU's target marketing list consists of truthful, lawfully obtained information that poses no harm to the public. In fact as is established in Section II B of this brief, both the entities making solicitations use the information communicated to them by Trans Union and the recipients of those solicitations reap considerable benefits.

The FTC's ban involves the effective restriction of communication of all the names and addresses in Trans Union's relevant database, unless the consumer

provides affirmative consent. As a result, the accuracy of TU's data products will diminish. Each year, tens of millions of Americans move. The most accurate source of change of address information is not the United States Postal System (USPS), but rather credit header information. Because they are vested in financial institutions, consumers tend to provide such institutions with accurate, updated contact information. Loss of this rich source of accurate contact information, essential to all database marketing efforts, will result in gross inefficiencies – increased return post, increased volume of unwanted solicitations, increased marketing costs resulting in increased prices for consumers – and will reduce economic benefits currently enjoyed by a wide section of the population. As such, there exists a clear public interest in this case, distinct from the narrower interest ruled on in *Dun & Bradstreet*.

Moreover, the information contained in the referenced credit report in *Dun & Bradstreet* involves a company's sensitive financial information regarding the company's assets and liabilities, indicating that the company had filed for a bankruptcy. In stark contrast, Trans Union's target marketing list contains only non-sensitive information. In addition to simple name and address information, these lists contain data about certain attributes. For example, the fact that an individual holds a credit card, a home mortgage, or a car loan, etc. *See Trans Union II*, 245 F.3d 809, 812 (2001). TU's marketing list does not include specific account information such as balance, account number, personal identification number (PIN), or other information that, if accessed, could cause an individual harm. This type of information is of no use to direct marketers as it has no predictive value. A mother's maiden name, or PIN, for example, predict nothing about an individual's likely consumption habits.

II. THE CIRCUIT COURT ERRED IN ITS APPLICATION OF INTERMEDIATE SCRUTINY.

A. The Circuit Court Erred When it Concluded that the Fair Credit Reporting Act Was Narrowly Tailored To a Substantial Governmental Interest.

We urge the Supreme Court to apply strict scrutiny to Trans Union's speech, because the Circuit Court erred in assuming that information in TU's target marketing lists were matters of only private concern warranting less than full Constitutional protection and the FTC's attempted regulation makes a content based distinction. Under the strict scrutiny standard of review, the FTC may regulate TU's speech only if the proposed restriction on speech promotes a compelling state interest and is the least restrictive means to further the articulated interest in that there are no alternative means of furthering the governmental interest. *See Action For Children's Television v. F.C.C.*, 58 F.3d 654, 657 (D.C Cir., 1995). Under inter-mediate scrutiny, the regulation must advance a substantial governmental interest in a material way and be narrowly tailored in reaching its objective. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

In *Trans Union III*, the Circuit Court concluded that the FTC's restrictions on the petitioner's target marketing list pursuant to the FCRA concerned no public issue and was thus subject to intermediate scrutiny rather than strict scrutiny. *See* 267 F.3d 1138-1142 (2001). Moreover, in response to TU's arguments that the FCRA makes a content based distinction, the Appellate Court held that the "notion that content based restrictions warrant strict scrutiny . . . derives from cases involving fully protected speech" and that since "Trans Union's target marketing lists are private speech warranting only qualified constitutional protection", "[w]e need not decide whether content-based re-

strictions of private speech might sometimes merit strict scrutiny." *Trans Union III*, 267 F.3d 1138, 1141 (2001) (referring to *Arkansas Writer' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) and *FCC v. League of Women Voters*, 468 U.S. 364 (1984)). However, as stated earlier, information in TU's target marketing lists are a matter of public concern and are utilized by varying types of entities for the benefit of private firms, public sector and political entities, nonprofit and charitable institutions, and the general consuming public.

Contrary to the Circuit Court's decision, the FTC's restriction on TU's ability to disseminate information in its target marketing list is unconstitutional, because it is underinclusive and makes a content based distinction. The FTC's restriction on TU's speech fails for being underinclusive, because it allows target marketing for prescreening offers of credit and insurance, subject to choice of opt-out; but, in contrast, it requires affirmative consent (opt-in) from individuals before their non-sensitive information can be disclosed for other targeted marketing purposes. *See In re Trans Union Corp.*, Opinion of the Commission, No. 9255 at 15-17 (Feb. 10, 2000) and 15 U.S.C. § 1681(c)(1)(B)(i). The appellate court erred when it held that the prescreening exception to the FCRA's general opt-in requirement did not demonstrate a lack of narrow tailoring to an important governmental interest, because it results in communication of information that is more invasive of an individual's privacy than information disclosed for other target marketing purposes. *See* 55 Fed. Reg. 18807 & n. 14 (II 4) (May 4, 1990).

Specifically, information that is required for prescreening involves the disclosure of detailed credit performance information or credit history that is more invasive of a person's privacy – for instance, whether a person pays on time and how the consumer pays his or her bills. On the other hand, target marketing lists

for other purposes require only the disclosure of names and addresses of individuals meeting certain general criteria -- for example, whether an individual merely holds a credit card, a mortgage, or a loan.

Regardless, the FTC concluded that in prescreening "there is relatively insignificant harm to the consumer because the privacy infringement is minimal" and that "any "invasion of the consumer's privacy " is "modest" when his or her credit history is being reviewed. 55 Fed. Reg. 18807 & n. 14 (II 4) (May 4, 1990). In fact, this is the only instance in the FTC record that cites a potential harm posed by target marketing.

In summary, prescreening for offers of credit and insurance is one form of target marketing, similar to target marketing for other purposes that is being restricted by the FTC. However, the FTC's administrative ban treats these similar, socially-beneficial forms of speech differently, subjecting the former to an opt-out requirement and the latter type to an opt-in. Consequently, the restriction is unconstitutional under intermediate scrutiny because it is underinclusive, and fails under strict scrutiny because it is a content-based restriction on expression and is not narrowly tailored.

Additionally, as with prescreening to offer credit or other financial service opportunities, database marketing of goods, services, and for other purposes, e.g., for charitable and political contributions, is also socially valuable. The circuit court notes that Congress singled out prescreening, noting in its opinion: "Congress apparently believes that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sale pitches." 267 F.3d. 1138, 1142 (2001). By making this assertion, however, the appellate court erred in assuming what Congress "apparently" believes. It offered no real empirical evidence that Congress considered in reaching its conclusion that people are less

willingly to reveal personal information for catalogs and sales pitches than for pre-approved offers of credit and insurance. The appellate court inferred this from unspecified text and non-existent evidence.

B. The Circuit Court Erred by Rejecting Trans Union's Argument that the "Opt-out" Requirement is a Substantially Less Restrictive Means of Limiting Trans Union's Speech than an Opt-in Requirement.

Under intermediate scrutiny, the FTC's ban on TU's dissemination of its target marketing list under the FCRA violates TU's First Amendment rights to free speech, because the governmental interest in protecting personal financial information can be promoted by choosing a less restrictive means of doing so, namely via an opt-out approach. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), Justice O'Connor stated in her concurring opinion: "[t]he availability of less burdensome alternative to reach the stated goal signals that the fit between the legislature's ends and means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny."

Under an opt-out regime, TU can disseminate information about all individuals in its database, unless the individual notifies TU that he or she does not want TU to share information about them to third parties. In contrast, under the opt-in regime, TU is not permitted to communicate any of its information about individuals in its database unless the individual affirmatively consents.

However, findings from empirical studies prove that an opt-in regime, unlike opt-out, would impose a great burden not only on information service providers like Trans Union, but also on all companies that collect, store, analyze, and share data about their customers. An emerging body of research indicates that an opt-in would be expensive, time-consuming, and

impractical if not impossible for the entity charged with obtaining affirmative consent for every individual in its database. Consequently, an opt-in regime amounts to an almost straight all-out ban on TU's ability to communicate information in its target marketing list.

Empirical evidence to data supports this. In 1997, U.S.West. (now Qwest Communications) conducted an affirmative consent case study to test the frequency and likelihood of actually obtaining consumer consent for the disclosure of their information. The results of the study revealed that a majority or 72% of individuals refused to grant consent when asked. The study conducted by U.S. West showed that "33% of those called refused to grant approval"; "28% granted such approval"; and "39% either hung up or asked not to be called again". *U.S. West, Inc. v. Federal Communications Commission*, 182 F.3d 1224, 1239 (10th Cir. 1999), *cert. denied* 528 U.S. 1188 (2000). The trial reveals the burdens associated with opt-in.

Additionally, the impact of an opt-in restriction on the dissemination of non-sensitive marketing data will also negatively impact nonprofit and charitable organizations. A recent study of nonprofit charitable organizations indicate that such organizations raised almost $80 billion in 2000 through the use of direct mail and telephone campaigns.[5] In doing so, these organizations spend approximately 41 cents to raise every dollar that is collected from their fundraising efforts. This figure includes the costs associated with executing a fundraising campaign, including labor, administrative costs, printing, postage and other related expenses. However, findings from a recent study of charitable and nonprofit organizations show that

---

[5] Michael A. Turner, Ph.D., THE IMPACT OF DATA RESTRICTIONS ON FUNDRAISING FOR CHARITABLE & NONPROFIT INSTITUTIONS (forthcoming 2002). This study has been sponsored by the Information Services Executive Council (ISEC) and The Privacy Leadership Initiative (The PLI). It will *be available at* www.the-dma.org/isec and www.understandingprivacy.org

"should an 'opt-in' style third party data restriction become law, administrative costs for charitable organizations would increase by 30 percent, and would force charities to spend 53 cents to raise a dollar of donations due to the lower response rates." This would amount to the loss of "approximately $16.5 billion that is currently allocated to charitable programs that will be spent on additional marketing costs," should an opt-in data restriction be imposed. [6]

Moreover, the United Postal Services (USPS) is a major beneficiary of direct marketing and of free flow of information, because direct mail marketing generates nearly half of the U.S. Postal Service mail volume.[7] Restrictions placed on the disclosure and dissemination of non-sensitive marketing information will ultimately reduce the amount of mail volume and therefore dramatically reduce the USPS revenues as companies gravitate toward other advertising media such as cable television, e-mail, or print.[8]

Further, according to one recent study, an opt-in restriction on non-sensitive marketing information would likely impose an information tax on people who buy apparel through catalogs that would range from 3.5 to 11 percent.[9] This tax falls most heavily on economically disadvantaged inner city residents as well as consumers living in rural areas.

For instance, the average catalog shopper lives 3 miles further from the nearest shopping mall or major retail store than does the profile non-catalog shop-

---

[6] *Id.*

[7] *Id.* at 277.

[8] Michael A. Turner, Ph.D., LIKELY IMPACT OF USPS ON RESTRICTIONS ON FREE FLOW OF INFORMATION (July 2001). This study is available at www.the-dma.org/isec under "white papers."

[9] Michael A. Turner, Ph.D., THE IMPACT OF DATA RESTRICTIONS ON CONSUMER DISTANCE SHOPPING (March 2001)This study was sponsored by the Privacy Leadership Initiative (The PLI) and the Information Services executive Council (ISEC). It is available at www.understandingprivacy.org.

per.[10] This would mean an additional 6 miles round trip to shop for apparel. Given that 70 percent of all catalog shoppers live in rural and suburban areas, it is safe to assume that a large number of catalog shoppers value the convenience for this reason. *Id.*

In economically disadvantaged inner city areas, apparel shoppers also rely heavily on catalogs as their neighborhoods are grossly underserved by brick-and-mortar retailers. Recent studies by The Boston Consulting Group and PricewaterhouseCoopers indicate that, in general, economically disadvantaged inner city residents also have less access to shopping centers and food stores than do their suburban counterparts.[11] Further, shoppers in economically disadvantaged inner city areas typically pay higher prices for goods and services and have fewer products to choose from.

Consequently, it is not surprising that mail order does well with economically disadvantaged inner city shoppers. *Id.* When asked to identify the store type bought from most often for women's apparel, 12 percent of African, 11 percent of white, and 9 percent of Hispanic inner city respondents indicated a preference for mail order catalogs, as compared to only 7 percent for the total population.[12] *Id.* Finally, inner city African American households report spending (in absolute dollars) more annually on apparel than the average U.S. household. Id. As can be seen, then, re-

---

[10] *See* Elrick & Lavidge Marketing, RESEARCH DIRECT INTERACTIVE BUYING PRACTICES STUDY (1999). This study was commissioned by The Direct Marketing Association and sponsored by the United States Postal Service.

[11] The Boston Consulting Group in partnership with The Initiative for a Competitive Enterprise, THE BUSINESS CASE FOR PURSUING RETAIL OPPORTUNITIES IN THE INNER CITY (1998); Pricewaterhouse Coopers, Opt. Cit.

[12] Total U.S. population includes: urban (non-inner city); suburban, rural, and inner city. This indicates that inner city shoppers are far more reliant on distance shopping than suburban and urban non-inner city households.

strictions like those imposed on Trans Union reach into the diverse fabric of the American economy.

CONCLUSION

For the reasons stated above, the *amicus curiae* respectfully urges the U.S. Supreme Court to grant Trans Union's petition for writ of certiorari.

Respectfully submitted,

Amy Oh, Esq.
Michael A. Turner, Ph.D.
Peter A. Johnson Ph.D.

1120 Avenue of the Americas
New York, N.Y. 10036-6700
(212) 768-7277